

A-20-000015

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

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IN THE INTEREST OF

BROOKLYN S.,

Brief of Appellant

Kwamayne Jackson, Natural Father of the Minor Child

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APPEAL FROM THE SEPARATE JUVENILE COURT
OF DOUGLAS COUNTY, NEBRASKA

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Honorable Christopher Kelly

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STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal by Kwamayne Jackson (hereinafter “Jackson”) from the juvenile court order terminating his parental rights to his minor child, Ky’Ari Jackson (hereinafter “Ky’Ari”). (T63-67). On December 10, 2019, the Separate Juvenile Court for Douglas County issued a Termination of Parental Rights Order as to the Amended Supplemental Petition and Termination of Parental Rights. (T37-40). On January 7, 2020, Jackson filed the Notice of Appeal, and the juvenile court issued an order allowing Jackson to Proceed *In Forma Pauperis*. This appeal is authorized by Nebraska Revised Statutes §§ 25-1901, 25-1911, 25-1912, and 43-245.

STATEMENT OF THE CASE

(a) Nature of the Case

On September 3, 2019, the State filed an Amended Supplemental Petition and Termination of Parental Rights alleging six counts against Jackson. (T37-40). Count I alleged that Ky’Ari lacked proper parental care by reason of the fault or habits of Jackson and Ky’Ari was within Nebraska Revised Statute § 43-247(3)(a). (T37). Counts II, III, and IV alleged that Ky’Ari was within the meaning of Nebraska Revised Statutes § 43-292 (2), (9), and (10). (T38). Count V alleged that reasonable efforts to reunify were not required under Nebraska Revised Statute § 43-283.01 because Jackson had subjected Ky’Ari to aggravated circumstances akin to abandonment, torture, chronic abuse, or sexual abuse. (T38). Count VI alleged that terminating Jackson’s parental rights with respect to Ky’Ari was in the best interest of the child. (T39).

On December 2, 2019, Jackson appeared before the juvenile court entered denials with respect to Counts I-VI. (T64). On December 10, 2019, following the presentation of evidence and arguments from counsel, the court issued an order finding Count I true by a preponderance of the evidence thereby confirming that Ky’Ari was within Nebraska Revised Statute § 43-247(3)(a).

(T65). The court also found Counts II-IV true by clear and convincing evidence such that it was in the best interests of Ky'Ari to terminate Jackson's parental rights and place Ky'Ari in the custody of the Nebraska Department of Health and Human Services. (T65). Ultimately, the court ordered Jackson's parental rights with respect to Ky'Ari to be terminated. (T66).

(b) The Issues Presented

The issues presented at the juvenile court proceedings were whether Ky'Ari Jackson comes within Nebraska Revised Statutes, sections 43-247(3)(a), whether Jackson's parental rights with respect to Ky'Ari should be terminated and whether it was in Ky'Ari's best interest to do so. (T63-67).

(c) How the Issues Were Decided and Judgement Entered

The juvenile court adjudicated Ky'Ari Jackson within section 43-247(3)(a), concluded that Jackson's parental rights to Ky'Ari be terminated, and determined it was in Ky'Ari's best interest to do so. (T63-67).

(d) The Scope of Review

"An appellate court reviews juvenile cases *de novo* on the record and reaches a conclusion independently of the juvenile court's findings." *In re Interest of Alec S.*, 294 Neb. 784, 792 (2016).

ASSIGNMENTS OF ERROR

I.

The juvenile court erred when it found Count I true because the State failed to prove by a preponderance of the evidence that Ky'Ari was within the meaning of Nebraska Revised Statute § 43-247(3)(a).

II.

The juvenile court erred in terminating Jackson's parental rights because the State failed to prove by clear and convincing evidence that Ky'Ari was within the meaning of Nebraska Revised Statutes § 43-292(2), (9), and (10).

III.

The juvenile court erred in terminating Jackson's parental rights because the State failed to prove by clear and convincing evidence that termination was in the best interests of Ky'Ari.

PROPOSITIONS OF LAW

I.

"A child's best interests are presumed to be served by having a relationship with his or her parent." *In re Interest of Alec S.*, 294 Neb. 784, 795 (2016).

II.

In order for a juvenile court to assume jurisdiction of a minor child, based on allegations of child neglect, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the statutory grounds for neglect. *In re Interest of Anaya*, 276 Neb. 825, (Neb. 2008); Neb. Rev. Stat. § 43-247(3)(a).

III.

"In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists." *In re Interest of Joseph S.*, 291 Neb. 953, 960 (2015).

IV.

“In order to terminate parental rights, the State must . . . prove by clear and convincing evidence that termination is in the child’s best interest.” *In re Interest of C.P.*, 235 Neb. 276 (Neb. 1990).

V.

“Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.” *In re Interest of J.B.*, 235 Neb. 74, 76-77 (1990).

VI.

“Termination of parental rights is permissible only in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.” *In re Xavier H.*, 274 Neb. 331, 351 (2007).

STATEMENT OF FACTS

This appeal pertains only to the juvenile court’s final order terminating Jackson’s parental rights with respect to his minor child Ky’Ari. (T63). The juvenile court proceedings, however, pertained more broadly to the three minor children of Ashley Terry (hereinafter “Terry”), including Ky’Ari. (T33-36). The other two children were Brooklyn and Ky’Lynn, neither of which were found to be natural children of Jackson. (T33-36). The precipitating event of the juvenile proceedings occurred when Ky’Lynn became unresponsive without any clear explanation while under the care and supervision of Jackson. (T37; E1, 1:115, volume III). Ky’Lynn was hospitalized and treated for severe injuries to her brain; these proceedings followed. (T37; E7, 1:39, volume III; E8, 1:39, volume III).

On September 3, 2019, the State filed an Amended Supplemental Petition and Termination of Parental Rights alleging six counts against Jackson with respect to Ky'Ari. (T37-40). Count I alleged that Ky'Ari lacked proper parental care by reason of the fault or habits of Jackson such that Ky'Ari was within the meaning of Nebraska Revised Statute § 43-247(3). (T37). In support of Count I, the State sought to prove, by preponderance of the evidence, the following subparagraphs:

- "A. Kwamayne Jackson was a caregiver of Ky'Lynn Jackson.
- B. Ky'Lynn Jackson was transported to the hospital due to being unresponsive.
- C. At the hospital, Ky'Lynn Jackson was diagnosed with injuries consistent with intentional physical abuse.
- D. Kwamayne Jackson was unable to provide a reasonable explanation for Ky'Lynn's injuries.
- E. Kwamayne Jackson has failed to provide, proper parental care, support and/or supervision for said juveniles.
- F. Due to the above allegation, said juveniles are at risk for harm."

(T37).

Count II alleged that Ky'Ari was within the meaning of Nebraska Revised Statute § 43-292(2) because Jackson had "substantially and continuously or repeatedly neglected and refused to give said child(ren) or a sibling of said child(ren) necessary parental care and protection." (T38). Count III alleged that Ky'Ari was within the meaning of Nebraska Revised Statute § 43-292(9) because Jackson had "subjected the juvenile or another minor child to aggravated circumstances" akin to abandonment, torture, chronic abuse, or sexual abuse. (T38). Count IV alleged that Ky'Ari was within the meaning of Nebraska Revised Statute § 43-292(10) because Jackson had

“committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.” (T38). Count V alleged that reasonable efforts to reunify were not required under Nebraska Revised Statute § 43-283.01 because Jackson had subjected Ky’Ari to aggravated circumstances. (T38). Finally, Count VI alleged that terminating Jackson parental rights with respect to Ky’Ari was in the best interests of the child. (T39).

The first hearing on the Amended Supplemental Petition and Termination of Parental Rights took place on November 14, 2019. (3:1-2). The court heard testimony from the following four witnesses: 1) Dr. Suzanne Haney, a licensed child abuse pediatrician employed at Children’s Hospital and Medical Center; 2) James Zeman, an employee for Global Tel Link, Inc.; 3) Lisa Crouch, a detective for the Omaha Police Department; and 4) Paige Worley, a family permanency specialist at St. Francis Ministries. (15:6-290:12).

The State called Dr. Haney as its first witness. (14:22-23). Testimony opened with a line of questioning about Dr. Haney’s role in the treatment of Ky’Lynn’s injuries. (21:20). Dr. Haney was unclear on specific details about Ky’Lynn’s case, but she was able to provide an overview of a typical consultation with a patient. (22:9-23:22). Thereafter, Dr. Haney predominantly relied on medical records to refresh her memory with respect Ky’Lynn’s case. (23:25-34:3; 68:3-5; E7, 1-4:39, volume III; E8, 1:39, volume III). The State’s direct examination culminated with Dr. Haney’s diagnosis of Ky’Lynn’s injuries as “abusive head trauma” (hereinafter “AHT”). (34:4-16). Dr. Haney recalled that Ky’Lynn’s initial diagnosis when she presented at the emergency room was “subdural hematoma.” (34:22-1). She explained that the most likely cause for subdural hematoma is one of two types of trauma—accidental or abusive. (35:2-4). The remainder of Dr. Haney’s testimony primarily centered around the bases for ultimately concluding that Ky’Lynn’s injuries were caused by abusive, as opposed to accidental, head trauma. (35:9-87:23).

On direct examination, Dr. Haney indicated that accidental head trauma was ultimately ruled out based on the following four observations:

- (1) Ky'Lynn's medical record did not provide an explanation as to how the trauma occurred;
- (2) Ky'Lynn was three months old at the time such that her injuries presumably were not self-inflicted;
- (3) Ky'Lynn presented with severe bilateral subdural bleeding, which was not consistent with a "single impact from a fall"; and
- (4) Ky'Lynn presented with severe retinal hemorrhaging; similarly not consistent with "any sort of short household fall."

(35:9 – 36:12).

Dr. Haney repeatedly stated that Ky'Lynn's injuries were not consistent with "a short fall from a short distance." (36:22-25). The State authenticated and offered Dr. Haney's medical notes pertaining to her diagnosis without significant follow up. (37:12-39:7). The court admitted the medical notes over objection by Jackson's counsel. (39:14-41:10). The State's direct examination of Dr. Haney was followed by cross-examination by the guardian ad litem (hereinafter "the GAL").

The GAL's first question was about the significance of brain bleeding on both sides of Ky'Lynn's brain which was mentioned by Dr. Haney on direct. (41:18-21). Dr. Haney once again confirmed that this observation was further evidence that Ky'Lynn's injuries were "not the result of a short fall." (42:3-4). In response to a follow-up question, Dr. Haney stated it was "hard to say" whether the bleeding indicated trauma on both sides of her brain—indeed, Dr. Haney later stated that the unilateral nature of Ky'Lynn's injuries indicated a significant impact on one side of the brain. (42:8-9; 76:19-21). The GAL then probed Dr. Haney for more information regarding her

knowledge of Ky'Lynn's condition since the incident. (42:11-46:11). After the GAL, Dr. Haney was cross-examined by Terry's counsel during which Dr. Haney confirmed that the medical record indicated Ky'Lynn was in the sole care of Jackson when her injuries were obtained. (46:20- 52:25).

Finally, Jackson's counsel conducted cross-examination of Dr. Haney regarding the AHT diagnosis. (53:4-81:7). At the outset, Jackson's counsel confirmed with Dr. Haney that there is no test to diagnose AHT. (58:7-8). Dr. Haney also recalled that Ky'Lynn did not present with any neck injuries. (58:10-12). Jackson's counsel asked Dr. Haney if she recalled any information regarding Brooklyn possibly "knocking [Ky'Lynn's] head on the couch." (65:6-8). Dr. Haney stated she remembered OPD detectives providing information about a sibling dropping Ky'Lynn, but she did not recall anything about a couch. (65:12-24). Jackson's counsel also asked about a car accident that Ky'Lynn was in about a week prior to her hospitalization. (66:9-11). Dr. Haney did not recall anything about a car accident. (66:9-23).

Jackson's counsel asked Dr. Haney about medical reports that Ky'Lynn suffered from both new and old subdual hematomas. (70:2-5). Dr. Haney expressed her dissent from that theory, yet she acknowledged that "some of the physicians documented they believed that there was old and new bleeds." (70:16-19). Dr. Haney went on to clarify as follows:

"I didn't say there weren't any old [bleeds]. I said I don't think you can tell if there were. They could all be new. They could be old and new . . . [i]t's possible she had an old one and a new one on top of it."
(71:22-24; 72:2-3).

Jackson's counsel then directed Dr. Haney's attention to her prior testimony about "short falls." (75:1-4). Dr. Haney responded that she kept referring to short falls simply because of the tendency for infants to fall frequently. (75:5). By way of explanation, Dr. Haney referred to a study

which showed that “many infants will roll off changing tables, be accidentally dropped by an adult, jump out a second-story window.” (75:6-8). Jackson’s counsel asked if it was true that even short falls—especially when defined broadly enough to include a fall from a two-story building—can cause severe injuries like those sustained by Ky’Lynn. (75:13-15). Dr. Haney responded affirmatively, albeit with a caveat that such scenarios are rare. (75:15-19). When asked what she believed happened to Ky’Lynn, Dr. Haney responded, “she had some sort of significant injury to her head . . . I’m not sure exactly how.” (76:1-3). Counsel also asked if it was noteworthy that Ky’Lynn did not present with a skull fracture. (77:19). In response, Dr. Haney stated, “I mean, I’m more likely to see a skull fracture with an accidental fall,” and when asked about the force generated by a short fall, Dr. Haney stated only that such was less than what is required for abusive head trauma. (78:11-14).

The State’s second witness was James Zeman, a system administrator at GlobalTel, Inc. which is the company that manages the inmate telephones at Douglas County Corrections. (89:5-15). Zeman provided general information regarding the functioning of the inmate telephones. (90:11-92:9). The State then attempted to use Zeman to authenticate three discs containing telephone conversations recorded on the inmate phone system, but the court sustained relevance and hearsay objections.

The State then called Detective Lisa Crouch of the Omaha Police Department. Crouch stated on direct that the emergency room doctors informed her that Ky’Lynn had suffered a subdural hemorrhage. (106:23-24). With this information, Crouch approached Jackson and Terry and interviewed them. (107:3-5). After the interviews, Crouch formed the opinion that all three children were at risk of harm because there was what she called “a significant brain injury that was unexplained.” (117:20-22). Crouch recalled consulting with Dr. Haney and then conducting a

second interview with both Jackson and Terry. (117:25-118:5). However, the State did not ask any questions about the details of these interviews; instead, the State simply offered the recordings. (118:4-122:6). Eventually, the State asked for Crouch's opinion as to whether a crime had been committed. (122:9-11). Crouch testified to her belief that Jackson committed "felony child abuse resulting in series(sic) injury," as evidenced by Jackson's arrest for the same on June 10, 2019. (123:1-2).

During cross-examination by the GAL, Crouch testified that Dr. Haney was the only doctor with whom she spoke to regarding Ky'Lynn's diagnosis. (124:18-22). The GAL also questioned Crouch regarding possible domestic violence between Jackson and Terry. (125:21-126:17). Crouch stated that during the first interview with Terry, she denied any domestic violence. (126:2-3). However, during the second interview, Terry mentioned that some of her arguments with Jackson had gotten physical in the past, including two weeks prior when Jackson is said to have thrown a vase. (126:3-7). Yet, Crouch had no other details about this incident. (126:10-17). Moreover, Crouch did not follow up or seek to corroborate Terry's story by speaking with Jackson. (134:3-5).

The GAL also inquired about Crouch's interviews with Jackson. (129:19- 132:19). Crouch described Jackson as "concerned about the children being taken away" and "talkative." (130:2-131:5). Crouch recalled that Jackson stated he wasn't sure what happened to Ky'Lynn, and he denied any wrongdoing. (131:4-10). Crouch also recalled that Jackson mentioned a number of possible theories as to what happened to Ky'Lynn. (131:4-10). For example, there was mention of Brooklyn hitting Ky'Lynn's head on the couch and a minor car accident a few days prior to her hospitalization. (131:12-18).

On cross-examination by Terry's counsel, Crouch testified to the existence of an old police report which detailed an incident where Brooklyn reported domestic violence to her school. (148:11-13). No charges were ever brought on the basis of this information. (149:1).

Jackson's counsel cross-examined Crouch with a particular emphasis on the two interviews with Jackson. (151:10-165:24). Crouch agreed that the Jackson's demeanor during the first interview was respectful, and they had a calm conversation. (153:11-24). Jackson's counsel also elicited information that Jackson told Crouch during the interviews including his memory of events on the day of Ky'Lynn's hospitalization. (157:9-159:25). According to Crouch, Jackson reported being at Terry's house watching all three kids when Ky'Lynn became unwell. (158:13-17). Jackson tried to wake the child up with a splash of water and then ran to Terry's place of employment because Jackson did not have a car or a telephone. (158:17-159:3). The two called for help, and Ky'Lynn was transported to the hospital. (159:21-23). Crouch testified that she did not interview any of the children involved in this case, and, while she did observe interviews with Brooklyn and Ky'Ari, such was reportedly not taken into consideration with regard to the ongoing investigation. (164:21; 172:6-10).

The State then called Paige Worley, a family permanency specialist at St. Francis Ministries. (173:7-12). On direct examination, Worley testified that she had been a family permanency specialist for eleven months. (174:20-22). Worley confirmed that her job is to form an opinion as to whether parental rights should be terminated in light of the "history of the family, what progress is being made in the case, and what the best interest is for the children." (180:9-11). When asked about her understanding as to why the three children were removed from their parents' custody, Worley simply referred to the fact that Ky'Lynn was brought to the hospital with "head trauma." (182:10-15). One factor that Worley weighed in favor of terminating the parental rights

of Terry and Jackson was “uncertain[ty]” about whether they would be able to care for Ky’Lynn’s medical needs while caring for Brooklyn and Ky’Ari at the same time. (209: 19-21).

On cross-examination by the GAL, Worley discussed four “intakes,” which she described as calls to an abuse and neglect hotline. (221:8-11). Worley described the intakes as demonstrating a pattern of domestic violence between Terry and other men. (228:3-229:11). When asked why this “pattern” of behavior is concerning with respect to the three children, Worley referred to the two instances in which the children have been injured. (229:15-17). The first instance was an incident wherein Brooklyn was harmed by an identified ex-boyfriend of Terry’s; the second instance was the unexplained injuries sustained by Ky’Lynn in this case. (232:7-11).

Additionally, Worley testified to her knowledge of forensic interviews conducted with Brooklyn and Ky’Ari. (249:6-10). With respect to Ky’Ari, Worley testified that she did not believe Ky’Ari had never witnessed domestic violence between Jackson and Terry. (250:16). Worley also mentioned some discussion of “physical abuse” reported by Brooklyn and Ky’Ari; however, Jackson’s counsel later clarified with Worley that it would be more accurate to say what the children described as “spankings.” (252:1; 282:10-17). Nevertheless, Worley expressed her opinion that it would be in Ky’Ari’s best interest to terminate Jackson’s parental rights. (256:23-257:3). In summary, Worley explained her justification for this opinion as follows:

Kwamayne has a history of violence and physical abuse, some of which Brooklyn Smith and Ky’Ari Jackson have disclosed, and we’re here because of Ky’Lynn’s head trauma, as well, and I would be concerned that another child could sustain more injuries as a result.

(258:6-11).

On cross-examination by Terry's counsel, Worley stated she did not have any understanding as to who caused Ky'Lynn's injuries. (264:5-7). Worley testified that she had never observed any of the children interact with Jackson, and she had only limited observation of the children with Terry over a period of five months. (276:16-277:20). Worley denied taking any steps to investigate the type of bond shared between Jackson and Ky'Ari. (278:6-279:13). Worley agreed that such information would be important to forming an opinion as to the best interests of the children. (278:11-15). However, when asked why she failed to inquire into the bond between Jackson and Ky'Ari, Worley simply stated, "That's not my job." (278:15-279:13). Worley also testified that there would be no negative impact on the children if the parents were allowed reasonable efforts to reunify, and that the only impact of allowing parents to participate in reasonable efforts to reunify would be to "allow them to continue to be with their biological parent." (281: 2-17).

On December 2, 2019, the hearing, the court heard from the final witness, Carrie Hillebrandt, a therapist at Hill Counseling & Consulting. (300:17-358:10). Brooklyn was a client of Hillebrandt's following Ky'Lynn's hospitalization. (308:13-25). Hillebrandt testified to vague references of possible domestic violence that Brooklyn has mentioned during their sessions. (320:1-5). On cross-examination, Jackson's counsel inquired into the context of these references which revealed that Brooklyn initially denied witnessing any sort of violence between Jackson and Terry. (340:16-21). The shift in Brooklyn's story came only after a three-week period during which Brooklyn was not allowed to visit her mother. (341:9-17). Hillebrandt testified that this gap in visitation would "absolutely" heighten any existing emotional struggles Brooklyn suffered from at the time. (341:18-21). However, Hillebrandt testified on cross-examination that she had never met or conversed with Jackson. (345:1-5).

After all parties rested, and the court took the matter under advisement. (368:1-2). On December 10, 2019 the court issued an order which found all of the allegations against Jackson true and terminated his parental rights with respect to Ky'Ari. (T63-67). Jackson now requests this court to reverse the juvenile court's erroneous decision and remanding this case for further proceedings.

SUMMARY OF THE ARGUMENT

The juvenile court erred in finding a preponderance of the evidence that Ky'Ari was within the meaning of Nebraska Revised Statute § 43-247(3)(a). The State purported to show that Ky'Ari lacked proper parental care by reason of the fault or habits of Jackson. However, the only factual basis provided to prove such allegation was Jackson's alleged intentional abuse of Ky'Lynn. There was no evidence or testimony presented concerning any needs of Ky'Ari, met or unmet, or how she was specifically at risk for harm.

Throughout the two hearings, the court heard extensive testimony regarding the incident with Ky'Lynn, including expert medical testimony from Dr. Haney. The court also heard from a number of individuals regarding Jackson's relationships with Terry and her older daughter, Brooklyn. However, the State failed to present any evidence regarding Jackson's relationship with his natural child—Ky'Ari. Accordingly, the recount of pertinent testimony laid out above is somewhat misleading in that the child whose best interest is at the heart of this case was scarcely mentioned during the proceedings that severed her ties with her father. With such little information on the record regarding Ky'Ari, the State could not have possibly presented enough evidence to support the indefinite termination of Jackson's constitutionally protected parental rights with respect to Ky'Ari.

The juvenile court erred in terminating Jackson's parental rights because the State failed to prove by clear and convincing evidence that Ky'Ari was within the meaning of Nebraska Revised Statutes § 43-292(2), (9), and (10). Under Nebraska law, the State must prove at least one of the statutory grounds enumerated in § 43-292 in order to terminate parental rights. *In re Interest of Joseph S.*, 291 Neb. 953, 960 (2015). In the present case, the State failed to make such a showing and the order terminating Jackson's parental rights should be reversed.

The juvenile court erred in terminating Jackson's parental rights because the State failed to prove by clear and convincing evidence that termination was in the best interests of Ky'Ari. Witnesses for the state testified only to the mere existence of Ky'Ari and the record is bereft of any evidence with respect to Ky'Ari's best interest.

ARGUMENT

I. THE JUVENILE COURT ERRED WHEN IT FOUND COUNT I TRUE BECAUSE THE STATE FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT KY'ARI WAS WITHIN THE MEANING OF NEBRASKA REVISED STATUTE § 43-247(3)(a).

The Supreme Court of Nebraska has stated that at the adjudication stage, for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), "[t]he court's only concern is whether the conditions the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247." *In re Interest of Anaya*, 276 Neb. 825, 838 (Neb. 2008) (citing *In re Interest of Brian B.*, 268 Neb. 870, 878 (Neb. 2004)). "While the State need not prove that the juvenile has actually suffered physical harm . . . at a minimum, the State must establish that without intervention, there is a definite risk of future harm." *Id.*

In support of Count I, the State purported to prove that Jackson had intentionally abused Ky'Lynn, a sibling of Ky'Ari. However, the testimony relating to the cause of Ky'Lynn's injuries was disappointingly vague and uncertain. Dr. Haney suggested that the only possible diagnosis was AHT, as she had apparently ruled out accidental head trauma based on the facts that the medical record was void of explanation, the injuries were presumably not self-inflicted, and Ky'Lynn's injuries were inconsistent with a "short household fall." While these observations certainly rule out self-infliction and a short fall as the cause of Ky'Lynn's injuries, it is not clear how these observations rule out any number of other potential accidental causes.

For example, as Jackson suggested during the investigation, perhaps Ky'Lynn was suffering from complications with an unnoticed prior trauma from the car accident or an accident involving Brooklyn. Or perhaps, although concededly rare, the injuries were caused by a sort of common household fall that simply resulted in uncommonly severe injuries. Indeed, perhaps the most likely alternative to AHT is some combination of the above. Nevertheless, the State appeared to take for granted that Dr. Haney's diagnosis of AHT conclusively established Jackson's "fault and habits" with respect to a lack of proper parental care. On the contrary, Dr. Haney's diagnosis merely established her medical opinion that, without any other explanation, AHT was the most likely cause of Ky'Lynn's injuries for purposes of designing a treatment plan. However, when asked to provide her opinion as to what actually happened to Ky'Lynn, Dr. Haney simply stated, "she had some sort of significant injury to her head . . . I'm not sure exactly how."

The evidence at trial also established that Jackson sought immediate medical care for Ky'Lynn as soon as she exhibited signs of distress. Testimony from Detective Crouch indicated both parents reported that Jackson ran to Terry's work and was "frantic" in seeking medical care for the child. Further, Detective Crouch conducted two interviews of Jackson, in which his story

of the events of that day remained consistent. Jackson voluntarily spoke with police at the hospital and later at OPD headquarters and repeatedly denied harming Ky'Lynn.

Without more, the State failed to prove by a preponderance of the evidence that Jackson had intentionally abused Ky'Lynn. Accordingly, the State failed to prove that Ky'Ari was at risk of harm, and the State failed to prove that Ky'Ari was within the meaning of § 43-247(3)(a). Therefore, the juvenile court lacked jurisdiction over Ky'Ari, and it was reversible error for the court to terminate Jackson parental rights thereto. Jackson requests this Court to reverse the juvenile court's termination of parental rights and remand this case for further proceedings.

II. THE JUVENILE COURT ERRED IN TERMINATING JACKSON'S PARENTAL RIGHTS BECAUSE THE STATE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT KY'ARI WAS WITHIN THE MEANING OF § 43-292(2), (9), AND (10).

The juvenile court erred in termination Jackson's parental rights because the State failed to prove by clear and convincing evidence that Ky'Ari was within the meaning of § 43-292(2), (9), and (10). To terminate parental rights, the State must prove by clear and convincing evidence that at least one of the statutory grounds in § 43-292 exists. *In re Interest of Joseph S.*, 291 Neb. 953, 960 (2015). In the present case, the court ultimately found that § 43-292(2), (9), and (10) all applied to Ky'Ari. This finding was erroneous insofar as the State failed to present sufficient evidence to prove such by clear and convincing evidence.

"Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *In re Interest of J.B.*, 235 Neb. 74, 76-77 (1990). Taking each subsection of the statute in turn reveals that the State failed to evoke such a firm belief or conviction as to whether Ky'Ari was within the meaning of § 43-292(2), (9), or (10).

The State sought to prove that Jackson's alleged intentional abuse of Ky'Lynn, a sibling of Ky'Ari, brought Ky'Ari within the meaning of § 43-292(2), (9), and (10). However, the State failed to prove by even a preponderance of the evidence that Jackson intentionally abused Ky'Lynn. Testimony from Haney failed to establish any causation for Ky'Lynn's medical condition, and all other witness testimony regarding causation stemmed from Haney's reports. There were no witnesses to wrongdoing, no admissions by Jackson to harming Ky'Lynn, only the testimony from Haney regarding the medical issues of Ky'Lynn. Accordingly, the State certainly failed to prove by clear and convincing evidence that Jackson caused injuries to Ky'Lynn and therefore did not meet its burden that Ky'Ari was within the meaning of § 43-292(2), and the court erred when it found Count II true by clear and convincing evidence.

In Count IV, the State argued that Ky'Ari was within the meaning of § 43-292(10)(d) insofar as Jackson "committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child *of the parent.*" (T38)(emphasis added). As charged in the Amended Supplemental Petition and Termination of Parental Rights, Count IV only implicates felony assault resulting in serious bodily injury to a child of Jackson. Because Ky'Ari is the only natural child of Jackson subject to these proceedings, and because the State failed to present any evidence tending to show Jackson committed a felony assault against Ky'Ari, the State could not have proved Count IV true by clear and convincing evidence.

According to Count V, the State purported to prove that no reasonable efforts to reunite Jackson and Ky'Ari under § 43-282.01 were required insofar as Jackson "subjected [Ky'Ari] to aggravated circumstances." (T38). First, because the State failed to prove Count III by clear and convincing evidence, there were no aggravated circumstances to speak of in this case. Moreover, even if the State had proved Count III with respect to Jackson's alleged abuse of Ky'Lynn, the

petition as written refers only to a scenario where Jackson subjected Ky'Ari to aggravated circumstances. However, in Count V, the State simply alleged that Jackson "has subjected said child to aggravated circumstances." (T38). The "said child" in this case was Ky'Ari alone. The State failed to present any evidence tending to show that Jackson subjected Ky'Ari to aggravated circumstances. Therefore, the court erred when it found Count V true by clear and convincing evidence. Altogether, the juvenile court erred in terminating Jackson's parental rights because the State failed to prove by clear and convincing evidence that Ky'Ari was within the meaning of § 43-292(2), (9), and (10).

III. THE JUVENILE COURT ERRED IN TERMINATING JACKSON'S PARENTAL RIGHTS BECAUSE THE STATE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT TERMINATION WAS IN THE BEST INTERESTS OF KY'ARI.

In addition to proving one or more of the grounds under § 43-292, the State must also prove by clear and convincing evidence that the termination of parental rights is in the child's best interest. *In re Interest of C.P.*, 235 Neb. 276, (Neb. 1990). It is well established under Nebraska law that the best interests of a child are presumed to be best served through a relationship with his or her parent. *In re Interest of Alec S.*, 294 Neb. 784, 795 (2016). Indeed, "[t]ermination of parental rights is permissible only in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code." *In re Xavier H.*, 274 Neb. 331, 351 (2007). Based on the idea that "fit parents act in the best interests of their children," this presumption is overcome only when the parent has been proved unfit. *Id.*

Even in cases where a parent is unable or unwilling to rehabilitate himself or herself, termination of parental rights is not necessarily in the best interests of the child. *In re Interest of*

Heather G., 12 Neb. App. 13 (2003). Best interests do not rest solely on evidence concerning the benefits to the children should parental rights be terminated, but also upon consideration of how the children will be negatively affected by the permanent severance of the familial relationship. *Id* at 30.

In the present matter, the State failed to present any evidence regarding the best interests of Ky'Ari specifically. Worley, the family permanency specialist assigned to this case, was the only witness to mention Ky'Ari in any anything more than a passing manner; yet, even she failed to indicate why termination of parental rights was in the best interests of Ky'Ari. Worley indicated that Jackson's alleged intentional abuse of Ky'Lynn formed the primary basis for her opinion that Jackson's parental rights should be terminated. However, Worley could not discuss at any appreciable length the evidence on which she based her opinion that Jackson had in fact intentionally abused Ky'Lynn. Indeed, Worley stated she did not know how Ky'Lynn sustained her injuries.

Moreover, Worley testified that she had never observed Jackson and Ky'Ari interact. Notably, Worley denied taking any steps to investigate the relationship between Jackson and Ky'Ari despite agreeing that such information would be important to forming an opinion as to Ky'Ari's best interest. Additionally, Worley had only been a family permanency specialist for eleven months and had only been involved with this case for five.

In *State v. Lorena (In re Aaron D.)*, the Nebraska Supreme Court reversed a termination of parental rights where the State did not call the child's therapists, foster parents, teachers, or support workers who directly observed the mother and child together as witnesses in a termination hearing. 269 Neb. 249 (2005). The Court criticized that the State "seem[ed] to have forgotten that the focus of the proceeding is not [the parent], but [the child]", and failed to "present evidence directly

adduced from many of the people most able to testify as to [the child's] condition.” *Id.* at 263. In *State v. Teresa S. (In re Heather G.)*, the Nebraska Court of Appeals rejected the termination of parental rights where the State failed to provide evidence that:

[T]he termination would change the lives of the children in any respect except that it would sever parental rights, including visitation rights, and possibly visitation. The evidence therefore indicates that any beneficial bond between the appellants and the children would be cut or weakened, and the evidence does not show any possible benefit to the children that might accrue as a result of that severance or weakening.

12 Neb. App. at 34. In the present case, the record is similarly devoid of *any* information about Ky’Ari Jackson. The State did not garner testimony from a foster parent or daycare provider, a doctor, nor was there any testimony about the impact—either positive or negative—that termination of Jackson’s parental rights would have on Ky’Ari.

Although the State contends that termination of Jackson’s parental rights were in the best interests of his child, it reduced Ky’Ari to a minor actor in the outcome of the termination proceedings. The State relied heavily on the testimony of Worley, who admitted that there was no negative impact on Ky’Ari if Jackson were provided an opportunity to participate in reasonable efforts to reunify. The State not only failed to provide any testimony about Ky’Ari and her unique needs or interests, but completely failed to provide proof of how or why the severance of Jackson’s parental bond be would favorable to his daughter. Accordingly, the State failed to rebut the presumption that the best interests of Jackson’s child is the preservation of a relationship with her father. Accordingly, the court erred when it terminated Jackson’s parental rights. Therefore, the

termination of Jackson's parental rights was not only unjustified but also inconsistent with the demands of the law, and as a result, this court must reverse.

CONCLUSION

For all the foregoing reasons, Jackson respectfully requests that this Court reverse the juvenile court's order of December 10, 2019, terminating his parental rights with respect to Ky' Ari.

Respectfully Submitted by

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Certificate of Service

I hereby certify that on Thursday, March 26, 2020 I provided a true and correct copy of this *Brief of Appellant Kwamayne J.* to the following:

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